IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 34 OF 2002.

Maruti Kesnur, r/o Haveri
Taluka, P.O. Kurubagonda
Vardarvoni Galli, Haveri,
Karnataka, Hutments Near
Hotel Colmar, Colva. ... Appellant.

Versus

State. ... Respondent.

Mr. P.P. Singh, Advocate for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 22nd August 2003.

ORAL JUDGMENT.

The appellant/original accused no. 4 stands convicted for an offence punishable under Section 395 of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for 3 years and to pay fine of Rs. 2,000/- in default, to undergo simple imprisonment for 4 months, by the IInd Additional Sessions Judge, Margao, by Judgment, dated 16th May 2002, in Sessions Case No. 18/99/II. It is this conviction and sentence which is challenged in the present appeal before me.

2. Alongwith the present appellant/accused no. 4, original accused 1 and 3 were also convicted for the offence punishable under Section 395 of the Indian Penal Code. They were also sentenced to suffer rigorous imprisonment for 3 years and to pay fine of Rs.

2,000/-. The learned trial Court had recorded that, as the original accused 1 and 3 were in custody since 10th and 14th January 1999 respectively, they would be entitled for set off in terms of Section 428 of the Code of Criminal Procedure. Thus, the accused 1 and 3 had undergone the sentence imposed upon them. They were, accordingly, released. In respect of the present appellant/accused no. 4, the learned trial Court observed that the accused no. 4 was in custody from 23rd January 1999 till 18th August 1999 and from 16th August 1999 till the date of Judgment. According to the learned counsel appearing on behalf of the accused, it is stated that the appellant/original accused no. 4 was arrested on 23rd January 1999 and was released on bail on 19th August 1999. Thus, the original accused no. 4 had undergone less than 7 months imprisonment. The original accused 1 and 3 have not challenged their conviction and sentence and the appeal has been filed only at the behest of original accused no. 4.

3. The facts in brief as are necessary for the decision of the appeal are set out hereunder:-

P.W.2 Snehlata Bhatikar, a Psychotherapist and a resident of Gogal, Fatorda, had requested her sister Sunita to give her company as her husband had gone out of station. On 6th February 1998, at about 2.30 to 2.40

in the morning, P.W.2 Snehlata heard the noise of banging on the entrance door. She immediately realized that some thieves were trying to break open the door and, therefore, she opened the door and four or five persons had entered the bedroom and demanded gold ornaments and cash. The said intruders were armed with knives and were speaking amongst themselves in Kanada and one of them spoke Tamil. She inquired from them as to what they had done to her watchman and one of the intruders told her that her watchman was latched in the bathroom. She was asked to give the keys of the cupboard and, on handing over the keys to the said persons, the said persons opened the cupboard and ransacked its contents. One of them tried to snatch her gold bangles. She handed over the gold bangles to the person. Her sister also got scared and handed over her gold bangles. The intruders took away several gold ornaments, cash and several other articles, such as, suitcase, briefcase, Titan watches, silver-coated milk jug, sugar bowl, etc.. Before departing the intruders had tied the hands of P.W.2 Snehlata and her sister Sunita. They also took away her Peugeot Car. After some time, the watchman entered the room and untied their hands. He also disclosed that he had been confined in the toilet. On the matter being reported to the Police, P.W.23 Dy.S.P. V.P. Tari rushed to the scene of offence and recorded the complaint of P.W.2

Snehlata. The scene of offence panchanama, at Exhibit P.W.1/A was drawn in the presence of P.W.1 Gaurish Anant Naik. The watchman Arun Sharma was referred for medical examination and was examined by P.W.18 Dr. M. Pacheco.

4. The appellant/original accused no. 4 came to be arrested on 23rd January 1999 and it is alleged that he had disclosed that he had sold one gold chain to a goldsmith at Hubli. The police party proceeded to Hubli alongwith panch witnesses and the goldsmith admitted having purchased the gold chain. However, since he had melted the gold chain, he handed over the molten lump of gold to the police. In the identification parade, which was conducted, neither P.W.2 Snehlata nor her sister P.W.12 Sunita identified the appellant/original accused no. 4. After completion of the investigation, a charge-sheet against the present appellant came to be filed. On committal of the case to the Sessions Court, charge under Sections 397 and 395 of the Indian Penal Code came to be framed against the appellant and the other accused. The accused denied their guilt and claimed to be tried. The prosecution in support of its case examined 23 witnesses.

5. The original accused 1 and 3 had been identified in the identification parade. The evidence against accused 1 and 3 and the present appellant is not

identical. Therefore, in the present appeal, reference is made only to the evidence in respect of the present appellant.

6. The appellant is alleged to have made a disclosure statement to P.W.23 Dy.S.P. Tari of having sold a gold chain to one goldsmith at Hubli. The said goldsmith is P.W.14 Mohan V. Kuldekar. P.W.14 Kuldekar states that he is running a jewellery shop at Hubli. He further states that one person by name Maruti Kensu had come to his shop and had expressed the desire to sell the gold chain as he was in need of money. P.W.14 Kuldekar, therefore, weighed the gold chain and he found that it was of about 17 gms. and, accordingly, gave that person an amount of Rs. 6,500/-. P.W.14 Kuldekar further told the said person to take back the gold chain after returning the money. He states that after about a month, the police alongwith the appellant/original accused no. 4 had come to his shop and had inquired about the gold chain. P.W.14 Kuldekar had clearly stated that he was unable to identify the person, who had sold to him the gold chain, due to passage of time. He has identified the molten lump of gold, which he had given to the police. In the cross-examination he has stated that he was unable to give the description of the gold chain and was unable to state whether the gold chain had any beads.

7. P.W.23 Dy.S.P. Tari states that during investigation appellant/original accused no. 4 had disclosed that he had sold one gold chain to a goldsmith at Hubli. After going to Hubli, the appellant/accused no. 4 had pointed out one shop of P.W.14 Kuldekar. From the shop of P.W.14 Kuldekar, molten lump of gold weighing about 17 gms. was attached under panchanama at Exhibit P.W.13/A in the presence of P.W.13 Mario Baptista. In the cross-examination, on behalf of the appellant/accused no. 4, P.W.23 Dy.S.P. Tari has admitted that he had not recorded the disclosure statement made by the appellant/accused no. 4. He has also admitted that at the time of drawing of the attachment panchanama, the appellant/accused no. 4 had only pointed out to the goldsmith. Appellant/accused no. 4 had not made any disclosure statement at the jewellery shop. He has also admitted that the complainant had not stated that her gold beaded chain weighing 17.5 gms. was also stolen. He has also admitted that P.W.12 Sunita had also not stated that a gold chain weighing 17.5 gms. was also stolen. He has admitted that no gold bangles were recovered at the instance of the appellant/accused no. 4.

8. P.W.13 Mario states that he had accompanied the police and the accused no. 4 to Hubli. The accused no. 4 had pointed out the shop of the goldsmith at

Hubli from whom a lump of gold weighing 17.5 gms. was attached, vide panchanama at Exhibit P.W.13/A.. P.W.15 Harichandra Raikar, a goldsmith had also accompanied the police party to Hubli.

9. The learned trial Court in its Judgment at paragraph 45 has held that from the evidence of P.W.23 Dy.S.P. Tari, P.W.13 Mario, P.W.14 Kuldekar and P.W.15 Raikar, the prosecution had established that the appellant/accused no. 4 had sold one gold chain to the goldsmith Mohan Kuldekar (P.W.14) and this fact was discovered pursuant to the disclosure statement made by the appellant/accused no. 4. In paragraph 46 of the Judgment, the learned trial Court had also come to the conclusion that the complainant had not stated that a gold chain weighing 17.5 gms. was also stolen. The learned trial Court then came to the conclusion that since the complainant, after registration of the offence, had telephonically informed P.W.23 Dy.S.P. Tari that, apart from the list given in the complaint, some gold chain had also been stolen. As such, therefore, according to the learned trial Court, the gold chain allegedly discovered at the instance of the appellant/accused no. 4 was stolen property.

10. The complainant P.W.2 Snehlata in her complaint had not stated that a gold chain weighing 17.5

gms. had been stolen. The appellant/accused no. 4 has not been identified by either P.W.2 Snehlata or her sister P.W.12 Sunita in the identification parade. In her substantive evidence she states that a gold chain having black beads was taken by original accused no. 3. The fact that a gold chain weighing 17.5 gms. was stolen has not been proved by the prosecution. P.W.14 Kuldekar the goldsmith has not identified the appellant/accused no. 4 as the person who had sold the gold chain to him. The disclosure statement of the appellant/accused no. 4 is also not recorded. The exact information which the appellant/accused no. 4 is stated to have communicated to the police is also not established. Thus, the prosecution has not been able to establish that the appellant/accused no. 4 had made a disclosure statement that he had sold a gold chain weighing 17.5 gms. to the goldsmith P.W.14 Kuldekar. In the absence of the prosecution proving that a gold chain weighing 17.5 gms. had been stolen, the evidence tendered by the prosecution is wholly unsustainable. The defence of the appellant/accused no. 4 is of denial. The prosecution ought to have established a nexus and ought to have proved by cogent and reliable evidence that a gold chain weighing 17.5 gms. had been stolen by the appellant/accused no. 4 and that the said chain was sold by the appellant/accused no. 4 to P.W.14 Kuldekar the goldsmith. In the absence of such

evidence, according to me, the appellant/accused no. 4 is entitled to be acquitted.

11. In the result, therefore, the appeal is allowed. The conviction and sentence of the appellant/accused no. 4 is, hereby, quashed and set aside and he is acquitted of the offence for which he was charged and convicted. His bail bond stands cancelled. Fine, if paid, be refunded to the appellant.

(P.V. HARDAS)
JUDGE.

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